Chapter 5

Fair treatment in the workplace

5.1 This chapter details the changes to the unfair dismissal system and briefly covers general protections.

Unfair Dismissal

5.2 In regulations and bills prior to 2001, the exclusion from unfair dismissal claims referred to new employees of businesses of 15 or less. From 2001, the exclusion was broadened to employees of businesses of less than 20. From 27 March 2006 under WorkChoices, it became an actual exclusion from unfair dismissal claims for businesses with 100 employees or less.[1]

5.3 Under WorkChoices the right of employees to bring an action for unfair dismissal was severely curtailed. The exclusion for businesses with 100 employees or less removed unfair dismissal protection from 4.6 million (or 56 per cent) of employees.[2] Even large employers were able to avoid unfair dismissal claims where they could establish that at least one of the grounds for the dismissal was a 'genuine operational reason'.[3] In addition, the dismissal provisions in the current act 'are among the most difficult to navigate'.[4]

Proposed changes

5.4 The bill will restore to employees the important right of unfair dismissal – the right to challenge harsh, unjust or unreasonable treatment in the workplace. Part 3-2 details that the new system will remove the 100 employee exemption. Instead it will introduce new minimum employment periods before a claim can be made. This will be 12 months for employees of businesses with fewer than 15 employees, and six months for employees in businesses with 15 or more employees. This will ensure a balance in the system by providing employers with an extended period where they can make sure that they have hired the right person for the job, while ensuring that existing employees are protected from harsh, unfair or unreasonable dismissal.

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1 Parliamentary Library Background Note 'Unfair dismissal and the small business exemption', Steve O'Neill, 11 March 2008.

2 EM, p. xlv.

3 Richard Hall, 'Australian Industrial Relations in 2005 – The WorkChoices Revolution', Industrial relations A current review, The Industrial relations Society of Australia, 2006, Chapter 1.

4 Ms James, *Committee Hansard*, 11 December 2008, p. 39.

5.5 Employees earning over $100,000 will only be able to make an unfair dismissal claim if their employment is covered by a modern award, or if their employment conditions are set by an enterprise agreement.[5]

5.6 While supporting the broader definition of small business included in the bill, Jobwatch pointed out that it does not appear to cover the situation where 'there is a common director among a number of otherwise unrelated companies or where the employer company is part of a larger franchise arrangement'. It called for the government to look at such situations where employees do not have access to unfair dismissal protection due to the nature of their employer's corporate structure. Specifically, in addition to the definition of 'associated entities', that a reference to franchising arrangements and common directors be included.[6]

Qualifying periods of employment

5.7 Clause 383 defines the minimum employment period as 12 months for employees employed by a small business, and six months for other employees. Casual employees will have the same qualifying periods as permanent employees, depending on the size of their employer. However, they must have been employed on a regular or systematic basis for the period.[7]

5.8 The NTEU were concerned about the requirement for continuous service and suggested that this could be addressed by inserting a provision into clause 384 along the lines of 'the requirement is 6 months continuous service or 12 of the previous 24 months'.[8]

5.9 A number of submissions have been critical of the qualifying periods in the bill. The Employment Law Centre of WA told the committee that the extension of the qualification period to 12 months for small business seems counter-intuitive 'given that it should take less rather than more time to assess the suitability of an employee in a small business environment'.[9] Unions WA also did not support the 12 month exclusion period for small business employees and advocated that these employees should also be subject to the six month period.[10] The AWU argued that the Small Business Dismissal Code (see below) negates the need for a distinction between small and large businesses with regard to minimum employment periods.[11]

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5 DEEWR, *Submission 63*, p. 43.

6 Jobwatch, *Submission 87*, p. 40.

7 EM, p. xlvi.

8 NTEU, *Submission 105*, p. 4.

9 Mr Michael Geelhoed, Employment Law Centre of WA, *Committee Hansard*, 29 January 2009, p. 2.

10 Unions WA, *Submission 70*, p. 8. See also TCFUA, *Submission 11*, p. 26.

11 AWU, *Submission 81*, p. 6.

5.10 The ACTU pointed out that the qualifying period has traditionally been three months, or a lesser period of probation. It submitted that the qualifying period in the bill excludes 22 per cent of small business employees from claiming unfair dismissal, 41 per cent of all hospitality workers, and 64 per cent of young people aged 20-24. As a result the ACTU recommended that the qualifying period should be returned to three months, or a lesser agreed period of probation.[12] This recommendation was supported by the ETU (Qld), the ASU, the AWU and the National Association of Community Legal Centres Employment Network, among others.[13]

5.11 The AWU submitted that clause 384(2)(b) should be deleted as it allows an employer to evade the unfair dismissal provisions by informing employees that their previous service will not be recognised. It argued:

> This provision could allow an employer to unfairly dismiss an employee who has performed the same job at the same business premises for 15 years and leave the unfairly-dismissed employee with no recourse.[14]

5.12 The ACTU was also concerned that clause 384(2)(b) allows a new employer to require a transferring employee to re-serve a qualifying period for accessing unfair dismissal remedies.[15] The ACTU also noted that the bill exempts employers from the obligation to give notice of dismissal during the qualifying period. It submitted that as the provision is unfair and inconsistent with international obligations it should be removed.[16]

5.13 DEEWR clarified that the minimum employment period will include the previous service of an employee involved in a transfer of business, unless the new employer expressly informs transferring employees in writing of a requirement for a new minimum employment period. The bill also provides that where an employee takes up new employment within a three month period with an employer that is an associated entity of the previous employer, the employee's service with the previous employer will be taken to be continuous for the purposes of the unfair dismissal minimum employment period.[17]

Exemptions

5.14 Employees excluded from making an unfair dismissal claim are those not covered by a modern award or employed under collective agreements whose

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12 ACTU, *Submission 13*, p. 48. Also supported by the Australian Human Rights Commission, *Submission 137*, pp. 15-16.

13 ETU(Qld), *Submission 141*, p. 8; ASU, *Submission 56*, p. 44.; National Association of Community Legal Centres Employment Network, *Submission 106*, p. 2.

14 AWU, *Submission 81*, p. 7.

15 ACTU, *Submission 13*, p. 53.

16 Ibid, p. 49.

17 DEEWR, *Submission 63*, pp. 43-44.

remuneration exceeds the high income threshold of $100,000; and those who are dismissed due to genuine redundancy.[18] Other exclusions from unfair dismissal remedies include seasonal employment and specified-task employment at the end of which an employee's work is no longer required. The ending of employment that was for a fixed period or task is not considered to be a dismissal.[19]

The process

5.15 The process for dealing with unfair dismissal claims will be streamlined with many matters to be determined by a conference rather than a hearing. FWA will be flexible in gathering information, making inquiries and discussing issues with employers and employees, with a view to achieving a mediated resolution.

Time to lodge application

5.16 Unfair dismissal claims must normally be lodged with FWA within seven days (subclause 394(2)). A common criticism of the bill was that the seven day timeframe is too short, and would disadvantage employees in remote areas, those from a non-English speaking background, those who may be distressed and employees who may not be aware of their rights.[20] The Employment Law Centre of Western Australia claimed that lack of knowledge of unfair dismissal rights is unlikely to satisfy the definition of 'exceptional circumstances' required for late applications.[21] Ms Toni Emmanuel, Principal Solicitor of the Centre told the committee that the Centre, which represents non-unionised and disadvantaged employees in WA, would be unlikely to meet the need to provide legal advice in the seven day timeframe.[22]

5.17 The ACTU argued that a dismissed worker needs more time to seek advice and the timeframe may encourage dismissed employees to lodge claims to preserve their legal position while they seek advice. It suggested reinstating the application

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18 Explanatory Memorandum, p. xlvi.

19 Factsheet 9,'A simple, fair dismissal system for small business', 17 September 2008.

20 See USU, *Submission 4*, p. 6; Professor Peetz, *Submission 132*, p. 16; ACTU, Submission 13, pp. 47-48; ETU(Qld), *Submission 141*, p. 8; Law Institute of Victoria, *Submission 101*, p. 5; The NSW Office of Industrial Relations, *Submission 102*, pp.10-11; National Association of Community Legal Centres Employment Network, Submission 106, p. 2; CEPU, *Submission 109*, p. 13, Asian Women at Work, *Submission 110*, p. 3; Ms Anna Chapman, Centre for Employment and Labour Relations Law, Melbourne University, *Submission 48*, pp. 1-2; ASU, *Submission 56*, pp. 42-43; ANF, *Submission 61*, p. 4.; Unions WA, *Submission 70*, pp. 8-9; ASU, Victorian Private Sector Branch, *Submission 79*, p. 19; AWU, Submission 81, p. 6; TCFUA, Submission 11, p. 29; CPSU-SPSF, *Submission 77*, p. 11; Australian Human Rights Commission, *Submission 137*, pp. 15-16. .

21 Mr Michael Geelhoed, Employment Law Centre of WA, *Committee Hansard*, 29 January 2009, p. 2.

22 Ms Toni Emmanuel, Employment Law Centre of WA, *Committee Hansard*, 29 January 2009, p. 8.

deadline of 21 days.[23] This suggestion was supported by the Law Institute of Victoria among others.[24] FairWear Victoria advised that the proposed seven day time limit would disadvantage Textile, Clothing and Footwear (TCF) workers, 'who are predominantly migrant women workers, or workers with a lower level of formal education'.[25]

5.18 ACCI was also concerned about the short timeframe and told the committee it may result in the substitution of general protection claims for unfair dismissal claims. More consistency was needed between unfair and unlawful termination (60 days) claims and ACCI advocated a timeframe of 14 or 21 days.[26]

5.19 Professor Andrew Stewart believed the basis for the policy of a seven day period to lodge claims was well-founded. It encouraged quick resolutions of disputes and maximised the chances of an enforceable reinstatement. However, he agreed with other submitters that there is potential for injustice if the time limit is applied too rigorously. He proposed that employers be encouraged to give written notification to an employee at the time they are dismissed telling them that they have a right to an unfair dismissal claim and making them aware of the time limit.[27]

5.20 In a supplementary submission to the inquiry, Professor Stewart emphasised that, if the 21 day time limit is not retained, employees needed to have knowledge of the seven day time frame at the time of dismissal. He suggested that this take the form of a standard factsheet prepared by FWA to be given to a dismissed employee. This could be recognised in clause 394(3) as a factor to be taken into account by FWA in determining whether to allow a late application. He added:

> Under this proposal, it would still be up to each employer to decide whether they wanted to provide the statement. Some might take the view that they did not want to 'encourage' unfair dismissal claims. But if so, they would have to accept the risk of having a weaker case for resisting an otherwise late application. Hopefully, over time, most employers would see the value in issuing the statement as part of their standard processes for terminating employment. [28]

5.21 Professor Peetz suggested providing FWA with additional guidance on what would be considered valid reasons for delay beyond the seven day period such as where the employee was not (or could not reasonably be expected to be) aware of the

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23 ACTU, *Submission 13*, pp. 47-48.

24 Law Institute of Victoria, *Submission 101*, p. 5.

25 FairWear, Victoria, *Submission 90*, p. 10. See also Ms Liz Thompson, Campaign Coordinator, Victoria FairWear, *Committee Hansard*, 16 February 2009, pp. 3-4 and Hanh Le, Asian Women at Work, *Tabled papers*.

26 ACCI, *Submission 58*, Part 2, p. 180.

27 Professor Andrew Stewart, *Committee Hansard*, 28 January 2009, pp. 4-5.

28 Professor Stewart, *Supplementary Submission*, pp. 2-3.

seven day requirement, and where the employee is traumatised to the extent that they cannot properly consider making an application in the timeframe.[29]

5.22 The Australian Human Rights Commission suggested a slight change of language to ensure the discretion by FWA is sufficiently wide – that FWA 'needs only to be satisfied that it is appropriate to allow for a further period in all the circumstances of the case'.[30]

Committee view

5.23 In considering all the evidence, and the widespread view among both employer and employee organisations that the time limit of seven days is too short, as well as taking into account the varying conditions of employment and circumstances of employees, the committee majority believes that the strict seven day limit on making a claim for unfair dismissal is unsatisfactory. There will be many circumstances in which employees placed in this position will not be able to come to terms with the fact of the dismissal and take the appropriate advice within the currently proposed timeframe. The committee majority notes that section 394 (3) allows FWA the discretion to accept late applications, and that the FWA is likely to exercise this discretion appropriately. Nonetheless it believes that a statutory provision of 14 days is more likely to provide employees with time to seek advice and will prevent the practice of unmeritorious claims being lodged as a 'holding position' because there has been insufficient time for proper consideration and advice. A set time limit of 14 days will also provide the certainty that allows employers to then move forward to fill the vacant position without the risk of a subsequent challenge.

Recommendation 6

5.24 **The committee recommends that the bill be amended to provide for a fourteen day time limit within which time appeals against unfair dismissals must be lodged with Fair Work Australia.**

5.25 See also recommendation 2 in chapter 2 where the committee recommends the inclusion of unfair dismissal rights in the Fair Work Information Statement.

Hearings

5.26 The focus on informality has already been noted. ACCI suggests that employers be guaranteed the opportunity to respond to any allegations made against them, by the matter being taken up more formally. It doubted that employers could be assured that what they may tell FWA informally may not be subsequently used against

29 Professor Peetz, *Submission 132*, p. 16.

30 Australian Human Rights Commission, *Submission 137*, p. 17.

them.[31] The right for an employer to require a full hearing in the event of contested facts was supported by AiG.[32]

5.27 DEEWR admitted a slight bias against formal hearings, for the purpose of putting discretion in the hands of FWA. Officials pointed out that procedural fairness would apply in that:

> ...the tribunal member would have to be satisfied that, if he or she were not holding a hearing and were instead relying on other information or perhaps conferences, that would ensure that both sides had a say.[33]

Remedies

5.28 Remedies remain as they are. Reinstatement will be the preferred remedy unless it is not in the interests of either party. Where reinstatement is not feasible, compensation will apply, capped at the lesser of six months' pay or half the amount of the high income threshold. Factors for determining compensation within the maximum amount will be specified.[34]

Warnings

5.29 In response to questions by Senator Siewert regarding warnings, the department responded that warnings in writing are preferred but this is not mandatory. Officials explained that the FWA must satisfy itself that the warnings were provided and that, in cases of poor performance, employees are given reasonable opportunity to improve their performance. A checklist attached to the Small Business Fair Dismissal Code assists small business to provide appropriate evidence.[35]

5.30 FairWear Victoria advised that for TCF workers, particularly migrant workers, a written warning is essential and the employer should be required to take steps to ensure that workers understand those warnings. It also recommended a formal meeting where a worker can bring a support person to help ensure the worker has understood the warning.[36] These views were supported by the TCFUA.[37] Asian Women at Work suggested the government assist employers to provide written warnings by the development of templates or guidelines.[38]

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31 ACCI, *Submission 58*, Part 2, p. 194.

32 AiG, *Submission 118*, p. 91.

33 Ms Natalie James, *Committee Hansard*, 11 December 2008, p. 39.

34 DEEWR, *Submission 63*, p. 44.

35 Mr John Kovacic, *Committee Hansard*, 11 December 2008, p. 39.

36 FairWear, Victoria, *Submission 90*, pp. 10-11 and Asian Women at work, *Submission 110*, p. 3 and p.6.

37 TCFUA, *Submission 11*, p, 26.

38 Asian Women at Work, *Submission 110*, pp. 4-8.

Committee view

5.31 The committee supports these concerns. Employers should be required to take reasonable steps to ensure that warnings are provided in an appropriate format which can be understood by workers.

Recommendation 7

5.32 **The committee majority recommends that the Fair Dismissal Code be amended to provide that employers be required to provide a warning in writing, taking into consideration the needs of employees from a non-English speaking background.**

Small Business Fair Dismissal Code

5.33 Clause 388(1) enables the Minister to declare a Small Business Fair Dismissal Code (the code) by legislative instrument. The code, for businesses with fewer than 15 employees, will set out the steps a small business employer must take to ensure the dismissal is fair.[39] These arrangements recognise the special circumstances of small business owners who are without human resource management personnel.

5.34 A draft code was developed in consultation with representatives from employer organisations, the ACTU and some of its affiliates.[40] Among other things, the code provides that:

- a dismissal will be deemed to be fair whenever the employer has reasonable grounds to believe that the employee was guilty of serious misconduct (such as theft, fraud, violence or serious breaches of OHS requirements) and reports the allegation to the police or some other relevant authority. By implication, a dismissal cannot be challenged in such as case, even if the allegation turns out to be unfounded;
- in other cases, employees should receive a warning (which need not be in writing) about their performance or conduct, and be given a reasonable opportunity to improve, before being dismissed; and
- employees are entitled to have another person present to assist them in any 'circumstances where dismissal is possible'. However, that person cannot be a lawyer acting in a professional capacity.

5.35 The code was supported by AiG.[41] ACCI 'welcomed the effort to create' the code but feared that litigation on fairness of dismissal would be replaced by litigation on compliance with the code.[42]

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39 Explanatory Memorandum, p. xlvi.

40 Mr John Kovacic, *Committee Hansard*, 11 December 2008, pp. 39-40.

41 AiG, *Submission 118*, p. 90.

42 ACCI, *Submission 58*, Part 2, pp. 184-185.

5.36 The ACTU stated its view that all employees should be entitled to protection against unfair dismissal regardless of the size of the business.[43] It was concerned that employees could be summarily dismissed in the event of a suspicion that a worker has engaged in theft, fraud or violence. The ACTU argued that there is no requirement for the employer's suspicion to be correct or for procedural fairness to be followed. In addition, the ACTU noted that the code encourages employers to report their suspicions to the police.[44] It suggested that, if not abolished, the code should be redrafted to better reflect the jurisprudence of the courts and the AIRC. The ACTU also suggested that the Senate should be able to view the final version of the code before it approves the bill.[45]

5.37 The Australian Human Rights Commission suggested additional protections. Namely, that the employer must clearly particularise the allegation of serious misconduct against the employee, and provide the employee with the opportunity to respond to the allegation.[46]

5.38 The committee majority notes that the Code requires that an employee be given an opportunity to respond to allegations put against that employee - to present his or her side of the story – and must be given a reasonable opportunity to rectify the problem.

5.39 Ms Anna Chapman from the Centre for Employment and Labour Relations Law, Melbourne University, expressed disappointment as the code required only low standards from small business employers. She submitted that at the very least the warning should be in writing, the employee should be able to respond to allegations and the code should require employers to establish they have complied with the code.[47] The Australian Human Rights commission also supported the need for the warning to be in writing to assist understanding.[48]

5.40 Other organisations were also concerned about the reduction in formality in the code as well as the limited appeal process. The Employment Law Centre of WA noted the lack of definitions in regard to serious misconduct and what constituted reasonable periods of time. It also had concerns with the automatic legitimation of the summary dismissal in a situation where a police report is made, and in the elevation of the Code checklist to the status of evidence.[49]

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43 This was also supported by the Australian Human Rights Commission, *Submission 137*, p. 17.

44 These concerns were supported by Jobwatch, *Submission 87*, p. 40.

45 ACTU, *Submission 13*, p.48.

46 Australian Human Rights Commission, *Submission 137*, p. 18.

47 Ms Anna Chapman, Centre for Employment and Labour Relations Law, Melbourne University, *Submission 48*, p. 4.

48 Australian Human Rights Commission, *Submission 137*, p. 18.

49 Mr Michael Geelhoed, Employment Law Centre of WA, *Committee Hansard*, 29 January 2009, p. 3.

5.41 In response to employer concerns about the code, DEEWR officials advised that the code should ensure less complexity and enable a small business employer to avoid a lengthy unfair dismissal process by following the code.[50] DEEWR also informed the committee that the code is still in draft form and will be made a legislative instrument once the bill is passed.[51]

Conclusion

5.42 The committee majority notes the removal of unfair dismissal rights resulted in clear hardship for many, and of feelings of insecurity which affected morale and efficiency in the workplace. The Small Business Unfair Dismissal Code was developed with small business to meet their needs for flexibility. It takes account of the particular needs of small business and provides clear guidelines for employers and employees to manage underperformance and minimise claims.

50 DEEWR, *Submission 63*, p. 45.

51 Mr John Kovacic, *Committee Hansard*, 11 December 2008, p. 39.